6-19-2012

State v. Sileoni Appellant's Reply Brief Dckt. 38986

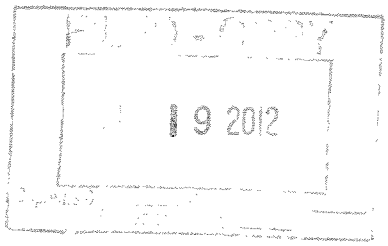
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. MAXIMILIANO SILEONI, Defendant/Appellant.	)	S.Ct. No. 38986

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Third
Judicial District of the State of Idaho
In and For the County of Canyon

HONORABLE RENAE J. HOFF
Presiding Judge



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II. ARGUMENT IN REPLY

A. Corrections to State's Statement of the Facts and Course of Proceedings

On page 1 of its Brief, the State wrote that I.C. " . . . agreed to go with Sileoni to the back room for sex in hopes of finding an opportunity to escape . . ." citing pages 2, 17, and 23 of the PSI. However, none of the information on these pages support this statement. Rather all three pages are duplicates of one another and all three state that I.C "stated she 'pretended to agree to go to the back' so she could flee." None state that I.C. claimed that she agreed or pretended to agree to go to the back to have sex.

As the key question in this case, whether the district court had a *sua sponte* duty to inquire into the factual basis for the plea, turns on whether Mr. Sileoni had the intent to commit rape, this summary of the information available to the district court is significant.

Counter to the state's erroneous reference to an agreement to go to the back to have sex, at PSI p. 4, Maximiliano stated, " . . . I know that I tuch her without her will but I never were really to rape her I sexualy tuch her and thas it I wasnt going to go more farder then that." And, in her statement to the police, I.C. did not say that she agreed to go into the back for sex, but rather "[I.C.] said she pretended to go along with the suspect by stating they should go in back." PSI p. 32, Addendum, Caldwell Police Department P.C. Affidavit/Case Synopsis. Further, the P.C. Affidavit/Case Synopsis reports that Maximiliano denied any intention of having sex with I.C. PSI p. 34, Addendum, Caldwell Police Department P.C. Affidavit/Case Synopsis. And, in her statement to the officer who first arrived on the scene, I.C. stated that Maximiliano asked her if she wanted to go to the back, but did not state that he asked her if she wanted to go to the back to have sex. She also reported that Maximiliano never lowered his own pants. PSI p. 38,

Addendum, Caldwell Police Department, Report Supplement. Additionally, during the police interview at the time of arrest, Maximiliano denied any intent to have sex with I.C. "Sileoni denied he had intended to have sex with [I.C.] and denied he ever had an erection (with my usage of the word boner being the word he responded to for understanding the word erection)." PSI p. 44, Addendum, Caldwell Police Department Report Supplement.

The state is incorrect when it says that I.C. agreed to go into the back of the store for sex. Rather, the information before the district court was as set out in Maximiliano's Opening Brief.

B. The State Has Misunderstood Maximiliano's Argument on Appeal

The state's Brief responds to "Sileoni's claim that his plea was not valid because he did not admit to the police his intent to rape." Respondent's Brief at page 4. However, this is not the issue presented on appeal.[1]

Maximiliano has presented the issue of whether remand is necessary to allow the district court to fulfill its *sua sponte* obligation to conduct an inquiry into the factual basis for Maximiliano's guilty plea and if the district court finds that the factual basis is lacking, allow Maximiliano to withdraw the plea. Appellant's Opening Brief at pages 9-13.

Maximiliano is not asking this Court to declare his plea invalid. Rather, he is asking that the case be remanded for the appropriate inquiry. Only if the district court finds that a factual basis for the plea is lacking, would Maximiliano then be allowed to withdraw his plea. *Id.*

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[1] The issues presented on appeal are set out at page 9 of Appellant's Opening Brief in accord with IAR 35(a)(4). The state has "rephrased" the issues presented at page 3 of its Brief. However, the appellate rules do not provide authority for a respondent to "rephrase" the issues on appeal. Rather, IAR 35(b)(4) authorizes the respondent to "list additional issues presented on appeal." Rephrasing of the issues may have led to the state responding to an issue which was never raised on appeal.

Maximiliano asks that this Court not allow the state's misunderstanding of the issue raised on appeal to result in a rejection of the actual issue raised on appeal. Whether the issue the state mistakenly believes was raised on appeal should be found meritorious or not is irrelevant to whether the actual issue raised on appeal merits relief.

C. Remand is Necessary for an Inquiry Into the Factual Basis of the Pleas

The state has argued, citing *State v. Wyatt,* 131 Idaho 95, 98, 952 P.2d 910, 913 (Ct. App. 1998)[2] and *Simons v. State,* 116 Idaho 69, 773 P.2d 1156 (Ct. App. 1989), that because Maximiliano entered guilty pleas, the district court had no duty to ascertain a factual basis for the pleas. Respondent's Brief at pages 5-6. In making this argument, the state does not address the controlling precedent - precedent which holds that there was a duty to inquire into the factual basis for the pleas. The state neither argues that this precedent is no longer valid nor that it should be overruled. Rather, it does not mention the precedent.

The precedent is as follows:

In 1982, in *Schmidt v. State,* 103 Idaho 340, 647 P.2d 796 (Ct. App. 1982), the Court of Appeals set out the general rule that a trial court has no duty to inquire as to the factual basis for a plea except in certain circumstances, including when the defendant does not recall the facts of the incident which resulted in the offense charged, or is unwilling or unable to admit participation in the acts constituting the crime, or couples the plea with continued assertions of innocence. In explaining the exceptions to the general rule the Court wrote:

> Of course, this holding does not diminish a court's obligation to conduct such an inquiry if - after a plea is entered but before sentence is imposed - the court

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[2] The state cites *Wyatt* as a Supreme Court case. Respondent's Brief at pages iii and 5. It is, however, a Court of Appeals case.

> receives information raising an obvious doubt as to whether the defendant is in fact guilty. In such circumstances, the trial court should inquire into the factual basis of the plea, either to dispel the doubt or to allow the defendant to plead anew.

103 Idaho at 345, 647 P.2d at 801.

A year later, in *State v. Coffin,* 104 Idaho 543, 550, 661 P.2d 328, 335, ftnt. 3 (1983), the Idaho Supreme Court quoted with approval the above language from *Schmidt,* upholding the plea in a case where the district court registered its concern about the lack of a factual basis for a guilty plea and gave the defendant "ample opportunity" to withdraw the plea, but the defendant, after discussion with counsel, determined that he wished to plead guilty anyway to the charged crimes.

Two years later, in *State v. Hoffman,* 108 Idaho 720, 701 P.2d 668 (Ct. App. 1985), the Court of Appeals again affirmed the duty to inquire into a factual basis for a plea in certain cases. "However, such an inquiry [into the factual basis] should be made if a plea of guilty is coupled with an assertion of innocence or if the court receives information before sentencing raising an obvious doubt as to guilt." 108 Idaho at 722, 701 P.2d at 670.

That same year, the Court of Appeals decided *Fowler v. State,* 109 Idaho 1002, 712 P.2d 703 (Ct. App. 1985). The issue in that case was whether Fowler's statements in the PSI were sufficient to raise an obvious doubt as to his guilt so as to trigger the duty to ascertain a factual basis for the plea. The *Fowler* court quoted the language of *Schmidt* requiring an inquiry into the factual basis if the court receives information raising an obvious doubt as to whether the defendant is in fact guilty and then held that Fowler's statements were not sufficient to raise an obvious doubt as to his guilt. Again the Court affirmed the existence of the *sua sponte* duty.

Six years after *Fowler,* in *Amerson v. State,* 119 Idaho 994, 996, 812 P.2d 301, 303 (Ct. App. 1991), the Court of Appeals wrote, "However, such an inquiry [into the factual basis for the plea] should be made if an *Alford*[3] plea is accepted, or if the court receives information before sentencing which raises an obvious doubt as to guilt." *Id.,* citing *State v. Hoffman, supra.*

Then just a year later, the Court of Appeals again affirmed that an inquiry into the factual basis for a plea is required if the court receives information before sentencing which raises an obvious doubt as to guilt in *State v. Ramirez,* 122 Idaho 830, 834, 839 P.2d 1244, 1248 (Ct. App. 1992), quoting *Amerson, supra.*

And, again, the duty was affirmed in *State v. Horkley,* 125 Idaho 860, 876 P.2d 142 (Ct. App. 1994). As in *Fowler,* the question before the Court of Appeals was whether the information received by the district court prior to sentencing was sufficient to raise an obvious doubt as to guilt so as to trigger the *sua sponte* duty. Again, as in *Fowler,* the Court of Appeals found that the information before the court did not raise an obvious doubt as to guilt, but did not alter the duty to inquire in the appropriate case.

None of these cases have been overruled. The precedent remains that if the district court receives information raising an obvious doubt as to guilt prior to sentencing, an inquiry must be made into the factual basis for the plea and if such basis is lacking, an opportunity must be given to withdraw the plea.

Rather than acknowledging this authority, the state cites this Court to *State v. Wyatt, supra,* for the "well-settled" principle that a district court need not elicit a actual basis for a plea entered without reservation. *Wyatt* presented a different issue for review by the Court of Appeals

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[3] *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160 (1970).

than the issue presented in this case. In *Wyatt,* a defendant who had pled guilty in a hearing wherein the district court elicited a factual basis for the guilty plea, asked the Court of Appeals to find that the district court had later erred in not granting his motion to withdraw his plea. In finding that the district court did not err, the Court of Appeals stated that the law is well-settled that a court need not elicit a factual basis before accepting a plea - and did not set out *any* of the exceptions to this rule - including the exceptions for situations in which the defendant does not recall the facts of the incident which resulted in the charge, the defendant is unwilling or unable to admit participation in the acts constituting the crime, the defendant couples the plea with continued assertions of innocence, or the court receives information raising an obvious doubt as to guilt. From this omission, the state argues that the district court does not have any duty to inquire into the factual basis of a plea in this case.

But, this omission of a list of the exceptions to the general rule did not amount to an overruling of the precedent imposing the exceptions. *See Schoger v. State,* 148 Idaho 622, 226 P.3d 1269 (2010) and *Mendiola v. State,* 150 Idaho 345, 247 P.3d 210 (Ct. App. 2010), decided after *Wyatt* affirming the duty to inquire into the factual basis to support an *Alford* plea.

The failure to mention the exception to the general rule not requiring inquiry into the factual basis for a plea in a case wherein the trial court receives information raising an obvious doubt about guilt prior to sentencing in a case wherein that exception could not possibly apply anyway (as the court did not receive any information raising an obvious doubt as to guilt and did make an inquiry into the factual basis of the plea), does not overrule the prior precedent establishing the exception nor does it negate the exception. The state's reliance on *Wyatt* is misplaced.

The state also relies on *Simons v. State, supra,* which it argues rejected an argument indistinguishable from Maximiliano's. Respondent's Brief at pages 5-6. However, *Simons* is clearly distinguishable from Maximiliano's case. Simons pled guilty to involuntary manslaughter based upon the death of Jameson. Simons and Jameson had been in an altercation and Simons, who was drunk, got into a car, locked the door and drove away. Jameson's hand was caught in the door of the car and Simons dragged him for seven or eight miles resulting in his death. When she was finally stopped by the police, she claimed that she did not know Jameson was attached to the car. 116 Idaho at 71, 773 P.2d at 1158.

Simons entered a guilty plea to involuntary manslaughter. 115 Idaho at 75-76, 773 P.2d at 1162-63. At the sentencing hearing, Simons made a denial of guilt that the judge found incredible. The Court of Appeals held, "This is not the kind of disavowal of guilt that triggers an obligation to ascertain a factual basis for the plea." The Court of Appeals further noted that even though the judge was not required to make an inquiry into the factual basis, the judge did do so and found that Simons intended to harm Jameson. The Court held that this finding was supported by the record and sufficient to satisfy any requirement to ascertain the factual basis of the plea. 115 Idaho at 76, 773 P.2d at 1163.

Rather than being indistinguishable from Maximiliano's case, *Simons* was a case where the Court held that an unbelievable denial of guilt at sentencing is not sufficient to trigger the recognized duty to make a *sua sponte* inquiry into the factual basis for a plea. In Maximiliano's case, rather than an unbelievable denial of guilt, the court was provided with information that there was not evidence to support a finding of the intent element of the charged offense. Specifically, Maximiliano had consistently stated that he did not intend to have sex, he did not

lower his pants, he did not have an erection, and I.C. did not make any claim that in agreeing to go into the back room there was ever any discussion of an intent to have sex, much less non-consensual sex.

Also, in *Simons,* the district court found that there was a factual basis for the plea. In Maximiliano's case the district court did not make such a finding.

The law is that if the district court receives information which raises an obvious doubt of guilt, it must make a factual inquiry into the basis of the plea. Here, the court received information raising an obvious doubt as to whether Maximiliano intended to engage in penile penetration, a necessary element of rape per I.C. § 18-6101, and without that intent, he could not be guilty of battery with intent to commit rape per I.C. § 18-907. Thus, there was a duty to inquire into the factual basis for the plea and this Court should remand this case with instructions to complete the required inquiry and if a factual basis is not found, to allow withdrawal of the pleas.[4] *Coffin, supra, Horkley, supra.*

D. The Record Does Not Demonstrate "A More Than Sufficient" Factual Basis for the Guilty Plea

The state also argues that even if an inquiry into the factual basis for the plea is required in this case, the record demonstrates "an exceptionally strong" factual basis. Respondent's Brief at pages 6-7.

Although the state claims the factual basis was exceptionally strong, it does not cite anything in the record that establishes this factual basis. Rather, it argues that as I.C. asserted

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[4] As set out in the Opening Brief at page 12, if there is no factual basis for the charge of battery with intent to commit rape, the plea to the deadly weapon enhancement must also be withdrawn.

that Maximiliano had "groped her breasts and genitals" and Maximiliano admitted as much, it was obviously rational to plead guilty to battery with intent to commit rape with a deadly weapon enhancement in exchange for dismissal of a kidnap charge. *Id.* But, whether the decision to plead guilty was rational is, of course, a different question from the question of whether there was a factual basis for the guilty plea.

And, of course, groping is not rape and groping is neither a necessary nor a sufficient precondition for an intent to commit rape. I.C. § 18-6101 (defining rape as penetration with the perpetrator's penis accomplished with a female under specified circumstances).

The job of inquiring into and ascertaining the factual basis lies with the district court. *Id.* This Court should remand the case to allow the proper court to make the required inquiry because this Court is a court of law and not a fact-finding court. However, should this Court be inclined to accept the state's invitation, an invitation Maximiliano does not extend, to make a factual finding regarding the existence of a factual basis for Maximiliano's pleas, this Court should find, for the reasons discussed above, that the factual basis was lacking and reverse Maximiliano's conviction.

E. The Issue Raised on Appeal is Properly Presented

The state's final argument is that Maximiliano may not present a motion to withdraw his guilty plea for the first time on appeal. Respondent's Brief at page 7-8. Again, the state has misunderstood the nature of the relief Maximiliano is seeking in this appeal. He is not presenting a motion to withdraw his guilty plea - which, of course, would be frivolous, as motions to withdraw pleas are heard in the district court not the appellate court. He is requesting that this Court review the failure of the district court to fulfill its *sua sponte* duty to inquire into the

factual basis for the plea and remand with instructions to conduct the required inquiry. Appellant's Opening Brief at pages 9-13.

The state cites three cases in support of its argument that Maximiliano may not present a motion to withdraw his guilty plea for the first time on appeal: *State v. Lavy,* 121 Idaho 842, 844, 828 P.2d 817, 873 (1991); *State v. Gomez,* 127 Idaho 327, 329, 900 P.2d 803, 805 (Ct. App. 1995); and *State v. Sands,* 121 Idaho 1023, 1025-26, 829 P.2d 1372, 1374-75 (Ct. App. 1992). While the state is correct that in these three cases, the appellate court declined to consider for the first time on appeal various issues relating to guilty pleas, none of the cases address the issue raised in this case - whether remand is appropriate when the district court failed to satisfy a *sua sponte* duty to make an inquiry into the factual basis for a guilty plea.

Further, all of these cases pre-date *State v. Perry,* 150 Idaho 209, 245 P.3d 961 (2010), and provide no insight as to whether the fundamental error doctrine as defined by *Perry* is intended to apply to issues concerning the *sua sponte* duties of trial courts. As discussed in Maximiliano's Opening Brief, insulation of *sua sponte* duties from appellate review by application of the fundamental error doctrine would render these duties as something other than *sua sponte.* This would impose a duty on counsel to object and would be contrary to public policy because it would increase the risk that trial courts would intentionally or unintentionally allow people to be convicted of crimes in violation of the most basic requirements of due process - requirements so basic that they are made *sua sponte* duties of the district courts. *See State v. Almaraz,* ___ Idaho ___, ___ P.3d ___, 2012 WL 1948499 (2012), which holds that *Perry's* reach is not limitless in precluding appellate review and allows the appellate court discretion to consider issues taking into account the context of the proceedings in the district court.

This Court should review the issue Maximiliano actually raised in appeal and remand the case for exercise of the district court's fact-finding power to inquire into the factual basis for the plea.

F. The Court Should Grant Relief From the Excessive Sentence

As discussed in the Opening Brief, if this case is remanded, it should be remanded with instructions that if the conviction ultimately remains, the sentence must be reduced. And, in the alternative, relief from the sentence should be granted in this Court because the sentence is excessive. Appellant's Opening Brief, pages 13-18.

In its Brief, the state argues that the district court did not abuse its discretion and therefore the sentence should remain. Respondent's Brief at pages 8-11. In making this argument, the state urges this Court to not conduct an independent review of the record, but rather to apply the standard that factual findings will not be set aside absent a showing that they are clearly erroneous. Respondent's Brief at page 9.

The case the state cites for this standard of review is *State v. Thomas,* 133 Idaho 682, 686, 991 P.2d 870, 874 (Ct. App. 1999). In *Thomas,* the Court of Appeals addressed three issues including whether the sentence imposed violated the constitutional prohibitions against cruel and unusual punishment and whether the sentence was excessive. The language quoted by the state for a standard of review of an excessive sentence ("Factual findings will not be set aside on appeal unless there is a showing that they are clearly erroneous." *Id.*) was actually the standard of review applied to the question of whether the sentence was cruel and unusual. With regard to the question of whether the sentence was excessive, the *Thomas* court applied the generally accepted standard for excessive sentence review cases: "Where an appellant asserts that the sentencing

court imposed an excessively harsh sentence, we conduct an independent review of the record and focus upon the nature of the offense and the character of the offender." 133 Idaho at 687, 991 P.2d at 875.

As recently stated in *State v. Justice,* 152 Idaho 48, 54, 266 P.3d 1153, 1159 (Ct. App. 2011), "The task of appellate sentence review is neither easy nor well defined." However, as reaffirmed in *Justice*, when an appellant contends that an excessively harsh sentence has been imposed, the appellate court conducts an independent review of the record. 152 Idaho at 53, 266 P.3d at 1158.

Maximiliano asks this Court to conduct that independent review. And, he asks that for the reasons set forth in the Opening Brief, that this Court find that the sentence imposed is excessive.

III. CONCLUSION

For the reasons set forth above, Maximiliano asks this Court to remand the case for an inquiry into the factual basis of the pleas with directions that if a factual basis is found lacking that an opportunity be given to withdraw the pleas. He also asks that the remand instructions include an instruction to reduce the excessive sentence should the pleas ultimately not be withdrawn. In the alternative, he asks that this Court reduce the excessive sentence.

Respectfully submitted this 19th day of June, 2012.

Deborah Whipple
Attorney for Maximiliano Sileoni

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 19th day of June, 2012, caused two true and correct copies of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

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